Case Law of the Constitutional Court of Slovenia and the Protection of the Environment

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Abstract

This paper gives an analysis of the Slovenian Constitution, its provision on a healthy living environment and other relevant provisions, including those on the jurisdiction of the Constitutional Court. They provide the legal basis for the Constitutional Court to review laws and other regulations that relate to the protection of the environment. Examination of the jurisprudence of the Constitutional Court proves that it has developed well-established case law on who may be granted standing in environmental matters and has set standards as to what extent certain measures and their impact on the environment may be tolerated in order to remain within the limits of constitutionality and legality. The Constitutional Court has been extremely cautious with respect to all proceedings prescribed by law and treaties binding on Slovenia in the case of planned modifications aimed at changing the existing state of the environment, including wildlife and spatial planning.

Keywords

Right to a Healthy Living Environment, the Jurisdiction of the Constitutional Court, Legal Standing in Environmental Matters, Environmental Treaties Binding on Slovenia

I. Introduction

Unlike some other constitutions, the Constitution of the Republic of Slovenia[2] contains an explicit environmental[3] provision. Under the heading *Healthy Living Environment* in Article 72 it provides:

"(1) Everyone has the right in accordance with the law to a healthy living environment.

(2) The state shall promote a healthy living environment. To this end, the conditions and manner in which the economic and other activities are pursued shall be established by law.

(3) The law shall establish under which conditions and to what extent a person who has damaged the living environment is obliged to pay compensation.

(4) The protection of animals from cruelty shall be regulated by law."

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[2]See Official Gazettes of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04 and 68/06.

[3]For more information on environmental protection in general, see e.g. Gaberščik (2012).

The right to a healthy living environment has been inserted in Chapter III of the Constitution addressing economic and social relations. It may be defined as a constitutional right of positive status: on the basis of Article 72/1 it belongs to everybody and the State is obliged for its assurance.[4] The constitutional right to a healthy living environment has been affirmed by the case law of the Constitutional Court.[5]

First, in Article 72/1, the Constitution guarantees the right to a healthy living environment to everyone, meaning legal and natural persons. The living environment is defined in Article 5/1 of the Environmental Protection Act as such part of nature that is exposed or could be exposed to the impact of human activities.[6] The defining of what is considered a healthy living environment or, in other words, to what extent the human environment may be considered healthy when taking into account man's impact on the environment, is left to the legislature.[7]

In Article 72/2, the Constitution obliges the State to ensure a healthy living environment by prescribing by law the conditions and means to conduct economic and other activities.[8] This provision is closely related to Article 67 of the Constitution (*Property*), which in Paragraph 1 requests the legislature to regulate the means of the acquisition of property in such a manner as to ensure its economic, social and environmental function.[9] It is also related to Article 74 of the Constitution (*Free Enterprise*), Paragraph 2, which prohibits the carrying out of commercial activity in a manner contrary to the public interest, as one of the aspects of the latter is also a healthy living environment.[10]

Article 72/3 proclaims one of the basic principles of (international) environmental law, namely the "polluter pays principle".[11] This is contained in a great number of international and national instruments and has been confirmed by national and international jurisprudence on the protection of environment. This principle demands States to ensure within their national legislations that the potential polluter bears all the costs for the prevention of the consequences of pollution and costs of their elimination if pollution occurs.[12] This principle has been inserted in Article 72/3 of the Slovenian Constitution, while its legal regulation is dealt with by the Environmental Protection Act.[13] This provision is also closely related to Articles 67 and 74 of the Constitution.[14]

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[4] Čebulj (2010).

[5] Order No. U-I-24/96 of December 9, 1999, OdlUS VIII, 279 (review of the constitutionality and legality of the Ordinance of the Amendment to the Ordinance on the Adoption of a Building Plan for the Central Area of Radovljica), Para. 13 of the reasoning; Decision No. 315/97 of March 16, 2000, Off. Gazette RS, No. 13/1999 and OdlUS IX, 57 (review of the constitutionality and legality of the Ordinance on the Location Plan for a Garage at the Entrance to the Town of Piran), Para. 22 of the reasoning; Order No. U-I-254/99 of April 12, 2001, OdlUS X, 74 (review of the constitutionality and legality of the Decree on Electromagnetic Radiation in the Natural and Living Environment), Para. 9 of the reasoning.

[6] Environmental Protection Act (ZVO-1-UPB1), official consolidated text, Off. Gazette RS, No. 39/2006 et seq.

[7] Čebulj (2010).

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Beyerlin and Marauhn (2011).

[12] Čebulj (2010).

[13] Ibid.

[14] Ibid.

Finally, Article 74/4 contains a clause on the protection of animals from cruelty and requires the legislature to regulate this protection by law.[15] This constitutional provision has been inserted in the said Article in an unsystematic manner, for it is not directly related to a healthy living environment.[16] Nonetheless, it touches upon an important issue that should not be ignored by any constitutional framer in the contemporary world.[17]

As already noted, the Environmental Protection Act is a special law on environmental issues.[18] It contains basic procedural and substantive rules that appertain to environmental issues. As such it has often been used as a measure of adjudication before the Constitutional Court. Relevant EU directives on the environment have now been incorporated in the law (they are listed in Article 1/2). For any activities that may substantially affect the environment, the prior consent rule and an environmental impact assessment are required (Article 50). It also includes provisions on the participation of the public (Article 58) and the transboundary impacts (Article 59). In addition, it contains penalty provisions (Article 192–194). The Nature Conservation Act[19] and the Spatial Planning Act[20] are also relevant to our discussion. They too have often been used as a measure of adjudication by the Constitutional Court in environmental matters.

II. Jurisdiction of the Constitutional Court

The Constitution establishes the jurisdiction of the Constitutional Court in Article 160 (*Jurisdiction of the Constitutional Court*). The Constitutional Court of Slovenia may be listed among those constitutional courts that possess rather wide jurisdiction. Accordingly, the Constitutional Court is empowered to examine the constitutionality (and legality) of all abstract legal acts passed by the legislature, including laws and ratified treaties, governmental regulations, and abstract acts passed by local communities (paragraph 1). It is also competent to examine the constitutionality of treaties before their ratification (paragraph 2) and to decide on constitutional complaints against the judgments of regular courts and other concrete decisions under the proviso that all legal remedies have been exhausted (paragraph 3, Article 160 of the Constitution).

It is the Constitutional Court Act that defines the Slovenian Constitutional Court as the highest body of judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms.[21]

It follows from the constitutional provision on the subject matter of the jurisdiction of the Constitutional Court that it is also competent to review the constitutionality and legality of local community regulations (4th subparagraph of Article 160/1). It must be noted that, on

[15] Animal Protection Act (ZZZiv-UPB1), official consolidated text, Off. Gazette RS, No. 29/2004.
[16] Čebulj (2010).
[17] Ibid.
[18] The term 'law' is used to indicate a legislative act passed by the National Assembly in the form of a law. The term 'Act' is used when addressing the concrete law passed by the legislature, i.e. the Environmental Protection Act.
[19] Off. Gazette RS, No. 56/99.
[20] Ibid., Nos. 110/02 and 8/03.
[21] ZUstS, official, consolidated text, Off. Gazette RS, No. 64/07.

this basis, the Constitutional Court has been involved in numerous environmental matters of local character and has thus contributed to the scope of the meaning of a healthy living environment promulgated in Article 72 of the Constitution.

The Constitutional Court has used the provisions of paragraphs 1 and 2 of Article 72 of the Constitution as a measure of adjudication on numerous occasions and has laid down well-established case law as to what extent it is the obligation of the State to ensure a healthy living environment. The Court has asserted that the State is under the obligation to determine the standards or the framework of admissible interferences with the environment in such a manner that the health of the people will not be endangered.[22] An excessive burden to the environment is not inconsistent with Article 72 of the Constitution if it does not exceed the prescribed limits or the framework of the allowed modifications of the environment and such a burden to the environment conforms to the relevant documentation on the modifications of the environment.[23] Inhabitants living in a particular locally connected community must bear certain nuisances, which are inevitably necessary for living in that community.[24]

III. Relevant case law of the Constitutional Court

Legal Interest in Environmental Matters

The legal system in Slovenia is not familiar with so-called class action[25] which may prove suitable in environmental matters lodged before national courts and tribunals.

In order to initiate proceedings before the Slovenian Constitutional Court, someone has to demonstrate legal interest (Article 162 of the Constitution, *Proceedings before the Constitutional Court*). According to Article 24/2 of the Constitutional Court Act, legal interest for lodging a petition shall be deemed to be demonstrated if a general act, including those issued by public authorities, and submitted for review by a petitioner, directly interferes with his/her rights, legal interests or legal position. In its case law, the Constitutional Court has developed rather strict requirements to be fulfilled in order to show legal interest.

Therefore it is important to note that in one of its early decisions when it reviewed the constitutionality and legality of the local Decree on adopting the building plan of the small industries zone of Spodnje Gorje, morphological unit "B-15" – "region 1.2 – Bled", the Constitutional Court recognized legal interest to initiate the proceedings before it to the Society of Ecologists of Slovenia. By the Order of June 30, 1995, on the admissibility of the petition, the Court passed the provisional measures upholding the challenged Decree and in the decision on the merits of the case it annulled the Decree, as the building plan contained in it had not been approved by the competent state body.[26] As the Constitutional

[22] For details, see note 2 above. See also Opinion No. Rm-2/02 of December 5, 2002 (review of the constitutionality of the Treaty between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Regulation of Status and Other Legal Relations Connected with the Investments in the Krško Nuclear Power Plant, Its Use and Decommissioning), Off. Gazette RS, No. 117/02 and OdlUS XI, 246, Para. 27 of the reasoning.

[23] Ibid.

[24] Case No. U-I-315/97, op. cit., Para. 23 of the reasoning.

[25] For the definition, see Garner (2009).

[26] Case No. U-I-30/95, Decision of December 21, 1995, Off. Gazette RS, No. 3/96.

Court found the challenged Decree illegal, it did not need to review its conformity with Articles 72 and 73 (*Protection of Natural and Cultural Heritage*) of the Constitution.
In the reasoning of the decision, the Constitutional Court gave a detailed explanation as to why it recognized the legal interest of the said society. It derived from the provisions of Article 4/3 of the Environment Protection Act, according to which among others, professional and other associations and other non-governmental organizations for the protection of the environment also provide protection of the environment in the context of their competences or rights and obligations.[27] On the basis of its Statute, the Society of Ecologists of Slovenia is a professional association, whose members are involved in research, professional, popularization, popular science and pedagogic activities in the field of the study of ecosystems and their protection, so the Constitutional Court considered it a subject of protection of the environment and recognized its legal interest in the actual case.[28]
On the basis of this landmark decision, it has become the established practice of the Constitutional Court to recognize the legal interest of environmental associations as an important part of the civil society in this field.

Participation of Public in Environmental Affairs

Lipica Stud Farm Case

In the *Lipica Stud Farm Case*, the Act on the Amendment to the Lipica Stud Farm Act was challenged by a group of petitioners that claimed legal interest on the basis of the fact that they owned land in the nearby area of the cultural monument, the Lipica Stud Farm. They alleged that by the challenged Act, their participation in the procedure for preparing and adopting the spatial regulation plan was prevented although their land was located in the area affected by the cultural monument. It must be explained that the Act on the Amendment to the Lipica Stud Farm was adopted with the intention to enlarge the area of the cultural monument in order to build an 18-hole golf course there.
The Constitutional Court abrogated a part of Article 5 of the said Act.[29] It reasoned that, in the procedure for the preparation and adoption of spatial acts, the participation of the public has been established as a standard for more than forty years.[30] The provision of the Act on the Amendment to the Lipica Stud Farm Act, which, with regard to the spatial arrangements plan, does not provide for a drafting and adoption procedure for such a plan according to spatial planning and management regulations (despite the fact that it is considered to be a detailed plan of national importance), and thereby prevents the public from participating therein, is inconsistent with the Aarhus Convention.[31]
It is important to note that in this case the Constitutional Court used as a measure of adjudication the Convention on Access to Information, Public Participation in Decision

[27] Ibid., Para. 8 of the reasoning.
[28] Ibid.
[29] Decision No. U-I-406/06 of March 29, 2007, Off. Gazette RS, No. 33/07 and OdlUS XVI, 23.
[30] Ibid., Para. 17 of the reasoning.
[31] Ibid., Para. 22 of the reasoning.

Making and Access to Justice in Environmental Matters, drafted at Aarhus on June 25, 1998, and binding on Slovenia (Aarhus Convention).[32] According to Article 8 of the Constitution, laws (and regulations) ". . . must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly." Treaties, ratified by the State Assembly (and published), have a higher rank than laws in the Slovenian domestic legal order. Therefore, the Constitutional Court was empowered to abrogate a part of the Act on the Amendment to the Lipica Stud Farm Act on the grounds that it was not in conformity with Articles 7[33] and 8[34] of the Aarhus Convention. Correspondingly, it attached to these two Articles the meaning of *self-executing* treaty norms.

Brown Bear Case

The Society for the Liberation of Animals and their Rights, Ponikva, challenged the Ordinance Amending the Ordinance on Protected Wild Animal Species and the Rules on the Taking of Brown Bears (*Ursus arctos*) from the Wild and alleged that both regulations were adopted contrary to Article 8 of the Aarhus Convention, as the public was not guaranteed participation during the procedure of their adoption. Consequently, it alleged that the challenged regulations were not consistent with the Constitution and EU law. The Constitutional Court recognized the legal interest of the petitioner, as it was not assured of participation in the process of the adoption of the regulations that regulate protection in the field of its activity.[35]

On the basis of Article 30 of the Constitutional Court Act[36], the Constitutional Court also decided to review the constitutionality of the Nature Conservation Act, as it was the legal basis for the adoption of the challenged governmental regulations. The said Act determines measures for the preservation of biodiversity and the system of protection of natural heritage with the aim of contributing to the preservation of nature.[37] According to Article 26 of the said Act, the well-being of plant and animal species protected by ratified treaties is assured by the protection of their habitat and the conservation regime, determined by the Government on the basis of the regulation envisaged in Article 81.[38] The latter authorizes the Government to adopt a conservation act for the protection of plant and

[32]Off. Gaz. RS, No. 62/04, Treaties, No. 17/04.

[33]Public Participation Concerning Plans, Programmes and Policies relating to the Environment.

[34]Public Participation During the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments. According to this provision, every State must strive to encourage the effective participation of the public in the preparation of the executive regulations by public authorities which can have an important impact on the environment.

[35]Decision No. U-I-386/06 of March 13, 2008,Off. Gazette No. 32/08 and OdlUS XVII, 11, Para. 3 of the reasoning.

[36]»In deciding on the constitutionality and legality of a general act or a general act issued by public authorities, the Constitutional Court shall not be bound by the proposal given in a request or petition. The Constitutional Court may also review the constitutionality and legality of other provisions of this or some other general act whose constitutionality or legality have not been challenged, if such provisions are mutually related or if this is absolutely necessary to resolve the case.«

[37]Decision No. U-I-386/06 op. cit., Para. 5 of the reasoning.

[38]Ibid., Para. 6 of the reasoning.

animal species, determine measures for their habitats and prescribe the rules of necessary activities and the special conservation regime. On the basis of these provisions of the Nature Conservation Act, the Government adopted the challenged Ordinance Amending the Ordinance on Protected Wild Animal Species.[39] The Constitutional Court established that from Article 8 of the Aarhus Convention stems the duty of the State to ensure the participation of the public in preparing the executive regulations of the public authorities that may have a significant effect on the environment.[40] The Constitutional Court realized that the Nature Conservation Act, which in its provisions provided the basis for issuing executive regulations in this field, did not regulate the participation of the public during their preparation and was therefore inconsistent with the Aarhus Convention and consequently with the Constitution.[41] Due to the fact that the Ordinance Amending the Ordinance on Protected Wild Animal Species was issued in proceedings which, contrary to the Constitution, were not regulated by the Nature Conservation Act, the Constitutional Court decided that this executive regulation was also inconsistent with the Constitution and abrogated it. For the same reasons it abrogated the Rules on the Taking of Brown Bears from the Wild, which were issued on the basis of the said Ordinance. The Constitutional Court suspended the effects of the abrogation for the period of time that the legislature needed to amend the Nature Conservation Act and for the period of time that the competent minister needed to issue new executive regulations in proceedings which would be determined by the legislature.[42]

Sečovlje Golf Course Case

In the *Sečovlje Golf Course Case*[43] (U-I-49/04), the petitioners challenged the Amendments of the Local Community Decree passed by the Municipality of Piran. They claimed that, according to the amended Decree, the highest quality farmland of the area would be used for sports and recreational activities instead of farming. The Constitutional Court established that the petitioners had legal interest to challenge the amended decree, as they lived in the area designated to become a golf course on the basis of its provisions. Before passing the amendments, the municipality had not made public disclosure of the amended decree by which additional farmland for the construction of the Golf Course was envisaged. The amended decree was therefore not adopted in conformity with the relevant provisions of the Spatial Planning Act. Consequently, the Constitutional Court annulled it (Decision No. U-I-49/04 of December 15, 2005).[44]

[39] Ibid.
[40] Ibid., Para. 9 of the reasoning.
[41] Ibid., Paras. 9 and 11 of the reasoning.
[42] Ibid., see the operative part of the decision. The designated time-limit was 3 months.
[43] Sečovlje is a coastal village within the municipality of Piran.
[44] Off. Gazette No. 120/05, Collection of Decisions (OdlUS) XIV, 92.

Preventive Review of the Treaty on the Krško Nuclear Power Plant

It has already been noted that the Slovenian Constitutional Court is also empowered to preventively review treaties.[45] Namely, in Article 160/1 of the Constitution it is determined that:

"In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government or a third of the Deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the Opinion of the Constitutional Court."

The Opinion is binding on the National Assembly in the event that the Constitutional Court establishes that a treaty is not in conformity with the Constitution. The National Assembly shall not ratify such treaty. Otherwise it is within the discretion of the National Assembly whether it will ratify it or not.[46]

The purpose of entering into the bilateral Treaty between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Regulation of Status and Other Legal Relations Connected with the Investments in the Krško Nuclear Power Plant, Its use and Decommissioning (Treaty on the Krško Nuclear Power Plant-NPP) was to regulate the ownership, operation and the decommission of NPP Krško between Slovenia and Croatia as the two neighboring independent States. Namely, the building of NPP Krško had been envisaged by the Agreement of October 27, 1970, between Slovenia and Croatia, then republics of the former SFRY. In the Agreement, they decided to build a joint nuclear power plant, situated in Krško, Slovenia. It was also agreed that investors from both the republics would participate in the financing in equal proportion and that they would share the rights and obligations in the same proportion.[47]

Several provisions of the Treaty on the Krško Nuclear Power Plant were challenged by one third of the deputies of the National Assembly. They alleged, inter alia, that Article 3 (*The Bodies of the Company*), Article 10 (*Decommissioning, Radioactive Waste and Spent Nuclear Fuel*) and Article 11 (*The Financing of Decommissioning and Disposal*) were not in conformity with Article 72/1–2 of the Constitution on a healthy living environment.

First, the Constitutional Court made some general observations it deemed necessary for the reviewing of the challenged provisions of the Treaty. In its interpretation of the challenged Treaty provisions, the Constitutional Court took into consideration that its preamble referred *inter alia* to the Convention on Nuclear Safety[48] and to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.[49] The Constitutional Court established the relationship between these two Conventions and the Treaty on Krško NPP on the basis of the law of treaties. It reasoned that the Convention on Nuclear Safety and to the Joint Convention on the Safety

[45] See the chapter II.

[46] Opinion No. 1/97 of June 5, 1997, Off. Gazette RS, No. 40/97 and OdlUS VI, 86. See also Opinion No. Rm 2/02 of December 5, 2002, op. cit. Paras. 20–21 of the reasoning.

[47] For details, see Opinion No. Rm-2/02, ibid., Paras. 11–15.

[48] Adopted in Vienna on September 20, 1996. Off. Gazette RS, No. 61/96, Treaties, No. 16/96.

[49] Adopted in Vienna on September 5, 1997. Off. Gazette RS, No. 7/99, Treaties, No. 3/99.

of Spent Fuel Management and on the Safety of Radioactive Waste Management must be understood in a manner such that these two conventions supplement the Treaty; in the event of disagreement between the two of them and the Treaty, the first two have priority.[50] If a provision of the Treaty is more specific, it has priority.[51] Furthermore, the Constitutional Court reasoned that, in reviewing the conformity of a treaty with the Constitution, it presumes that in the implementation thereof the Parties will behave in good faith and in conformity with the *pacta sunt servanda* principle, as enshrined in Article 26 of the Vienna Convention on the Law of Treaties.[52] Therefore, in reviewing the challenged treaty provisions, the Constitutional Court presumes that the Parties will fulfill the obligations arising from the Treaty.[53]

Then the Constitutional Court reviewed Article 10 of the Treaty, establishing that the disposal of radioactive waste and the decommissioning of Krško NPP are the joint obligation of the Parties. It reasoned that from Article 72/1–2 of the Constitution arises the obligation of the State to ensure the formulation of a plan for its decommissioning and radioactive waste management during the regular operating life of a nuclear facility.[54] The solutions adopted must, in conformity with the principle of prohibition against excessive burdening of future generations, respect the strictest safety standards.[55] Article 10 of the Treaty, in the part in which it refers to the disposal of radioactive waste, obliges the Parties to negotiate in respect of this issue. The Constitutional Court clarified that, irrespective of whether a joint solution concerning radioactive waste disposal is adopted or not, the State still has the obligation to ensure that any solution adopted is in conformity with the highest safety standards, respect for which is required by the said constitutional provision. Therefore, it decided that Article 10 of the Treaty, in the part in which it refers to radioactive waste disposal, is not inconsistent with the Constitution.

The Parties agreed that they would negotiate a joint solution concerning the decommissioning of the NPP. The Constitutional Court realized that the State is not obliged to wait indefinitely for the eventual adoption of a joint solution regarding the decommissioning of the NPP.[56] It is obliged to fulfill its part of the obligations determined in the Treaty, and after the regular operating period of the NPP it has to, as the State on the territory of which the NPP is located, ensure its decommissioning and, if necessary, adopt all necessary measures.[57] Accordingly, the Constitutional Court established that the part in Article 10 of the Treaty which refers to the decommissioning of the Krško NPP is not inconsistent with Article 72/1–2 of the Constitution. The question as to whether, in negotiations on the Treaty, the Government reached a balanced and, for both Parties, a just and acceptable solution, or whether Slovenia therewith did not assume additional obligations,

[50] Opinion No. Rm-2/02, op. cit., Para. 34 of the reasoning.
[51] Ibid.
[52] Adopted on May 23, 1969. Off. Gazette SFRY, Treaties, No. 30/1970, Act on notifying succession, Off. Gazette RS, No. 35/92, Treaties No. 9/92. See also ibid., Para. 35 of the reasoning.
[53] Ibid.
[54] Ibid., Para. 37 of the reasoning.
[55] Ibid.
[56] Ibid., Para. 40 of the reasoning.
[57] Ibid.

is not a subject of constitutional review, but a matter of political evaluation to be made by the National Assembly.[58]

In Article 11 of the Treaty, the Parties agreed that the financing of expenses for both the programs determined in Article 10 (i.e. the program of decommissioning and the program of radioactive waste disposal), would be equally divided between them.[59] However, the Parties did not establish a joint fund to which they would contribute their share of expenses on a periodical basis and in a transparent manner, but instead obliged themselves to create national funds for collecting these expenses. This provision of the Treaty was challenged as unconstitutional. The Constitutional Court assessed that it was not competent to adjudicate the suitability of the challenged provision of the Treaty, but only its conformity with the Constitution. It also reasoned that, irrespective of whether the Treaty enters into force or not, Slovenia, as the State on the territory of which the Krško NPP is located, must provide that the means for its decommissioning and for the disposal of nuclear waste and spent nuclear fuel will be ensured at all times. Therefore, it decided that Article 11 is not inconsistent with Article 72/1–2 of the Constitution.[60] Likewise, the Constitutional Court established that Article 3 of the Treaty, according to which the composition of the managing board is evenly divided and the Slovenian partner has the right to nominate the president of the board is not inconsistent with Article 2 (*Rule of Law*) and Article 72/1–2 of the Constitution.

The Treaty on the Krško Nuclear Power Plant with Annexes was ratified by the National Assembly on February 25, 2003.[61]

Review of the Anti-Smoking Act

Two petitioners, who filed a petition as both National Assembly deputies and citizens of the Republic of Slovenia, challenged certain provisions of the Act Amending the Restrictions on the Use of Tobacco Products.[62] They alleged that the ban on smoking in indoor places and indoor workplaces places put smokers into an unequal position, as they could no longer freely smoke in hospitality establishments and were forced to smoke in designated smoking rooms, where, however, they could not drink or eat, as the law prohibited them from doing so. In their opinion, the challenged Act interfered with their right to act freely (Article 35 of the Constitution), their personal liberty (Article 19 of the Constitution), their freedom of movement (Article 32 of the Constitution), and their personality and dignity (Articles 21 and 34 of the Constitution).

[58] Ibid., Para. 41 of the reasoning.

[59] Ibid.

[60] Judges Škrk and Ribičič dissented as the funding for decommissioning and nuclear waste disposal was arranged in a manner such that each Party would separately establish its own separate fund whereto it would separately and on the national level provide regular payment. See Partially Concurring and Partially Dissenting opinion of Judge Škrk.

[61] Off. Gazette RS, No. 23/03, Treaties, No. 5/03.

[62] Off. Gazette RS, Nos. 57/96, 119/02, 11/05, 17/06 – official consolidated text, and 60/07.

First, the Constitutional Court recognized the legal interest of the petitioners in respect of the provision of the challenged Act providing that "Smoking is prohibited in all indoor public places and indoor workplaces."[63] The Constitutional Court reviewed the challenged provision in light of the provision of Article 35 of the Constitution (*Protection of Right to Privacy and Personality Rights*).[64] It reasoned that the personality rights are not absolute and unlimited, but they are limited by the rights of others and in such cases as are provided by the Constitution (Article 15/3 of the Constitution). Therefore the Constitutional Court carried out a review of whether an interference with the human right is admissible on the basis of the so-called strict test of proportionality.[65]

Within the framework of the review of the necessity of the interference as part of the test of proportionality, the Constitutional Court established that the aim in question, pursued by the legislature, (i.e. the protection of workers and other persons from the adverse effects of environmental tobacco smoke) could not be achieved by other means.[66] At this point, the Constitutional Court *inter alia* relied on Article 8/1 of the WHO Framework Convention on Tobacco Control which is binding on Slovenia.[67] It also took into account some scientific data about the harmful effects of second-hand smoking, including those contained in the legislative materials.[68]

In examining the proportionality in the narrower sense that concerns a review as to whether the weight of the consequences of the reviewed interferences with the affected human right is proportional to the pursued aim or to the benefits which will result due to the interference, the Constitutional Court asserted:

"The ban on smoking limits smokers regarding their freedom to act when they are at their workplace or in indoor public places. This also applies to their visits to hospitality establishments, as such are increasingly more difficult due to the ban on smoking, whereas visiting hospitality establishments is one of the aspects of social life. On the other side are the individual's rights to health (Article 51 of the Constitution) and to a healthy living environment (Article 72 of the Constitution), which require that the legislature adopt appropriate measures for their provision."[69]

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[63] Ibid., 1st sentence of the first Paragraph of Article 16.

[64] Decision No. U-I-218/07 of March 26, 2009 (review of the unconstitutionality of the anti-smoking law), Off. Gazette RS No. 27, OdlUS XVIII, 12.

[65] Ibid., for the test of proportionality see Paras. 11–18 of the reasoning.

[66] Ibid., Para. 15 of the reasoning.

[67] Adopted in Geneva on May 23, 2003, Off. Gazette RS, No. 16/05, Treaties, No. 2/05. Article 8, *Protection from exposure to tobacco smoke*, »1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.«

[68] Decision No. U-I-218/07, op. cit. Para. 14 of the reasoning.

[69] Ibid., Para. 17 of the reasoning. The Constitutional Court also realized that Article 8/2 of the WHO Framework Convention on Tobacco Control requires that Slovenia adopt and implement measures providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

Consequently, the Constitutional Court decided that the challenged regulation of the ban of smoking is not inconsistent with the right to act freely determined in Article 35 of the Constitution. It also did not find any inconsistency with the Constitution on any other grounds.[70]

The Constitutional Court also recognized the petitioners' legal interest to challenge the provision of the Act determining that food and beverages may not be consumed in smoking rooms, but decided it was not inconsistent with the Constitution.[71] Regarding other challenged provisions of the Anti-Smoking Act, the Constitutional Court rejected the petition (para. 2 of the operative part of the decision).

NATO Overflights Case

Petitioner Ervin Dokič lodged a petition to review the constitutionality and legality of an unpublished act of the Government, by which it had allowed NATO military aircraft to use the airspace of the Republic of Slovenia during its military operations over the Federal Republic of Yugoslavia (FRY) at the time of the Kosovo crisis.[72] The petitioner alleged *inter alia* that the Article 72 of the Constitution guaranteed him a healthy living environment. This constitutional right, including the relevant provisions of the Environment Protection Act, was infringed by the excessive noise made by supersonic military aircraft while flying over Slovenia, especially at night. He also alleged that the challenged act was not published, as is required for such regulations according to Article 154 of the Constitution (*Validity and Publication of Regulations*).[73] Therefore he claimed that the challenged act was also contrary to the Government Act. The Christian-Social Union (Christian Socialists) joined the petition and claimed to have standing by virtue of its political program.

The Government responded that, following a NATO request[74], it allowed the use of Slovenian airspace for carrying out air operations above the territory of the FRY and to that effect it issued Order No. 803-05-98-1, dated October 11, 1998. Permission for such operations was requested in view of the possible use of force against the FRY concerning a critical situation which had arisen in Kosovo and which the UN Security Council had established posed a threat to peace and security in the region, with a humanitarian catastrophe as a possible consequence (SC Resolutions No. 1199 of September 23, 1998, and No. 1203 of October 24, 1998). The Government also explained the details of the escalation of the crisis in 1999.[75] As regards the overflights of NATO military aircraft over Slovenia, the Government asserted that they were flying over Slovenian territory

[70] The review of constitutionality was made in respect of Article 42/1 (*Right of Assembly and Association*), Article 14/2 (*Equality before the Law*), Article 19 (*Protection of Personal Liberty*) and Article 74 (*Free Enterprise*) of the Constitution. Ibid., Paras. 18–25 of the reasoning.

[71] Decision No. U-I-218/07, Paras. 27–32 of the reasoning.

[72] Order No. U-I-87/99 of July 8, 1999, Off. Gazette No. 60/99 and OdlUS VIII, 180.

[73] »(1) Regulations must be published prior to coming into force. A regulation comes into force on the fifteenth day after its publication unless otherwise determined in the regulation itself.«

[74] By means of a verbal note of October 10, 1998. Order No. U-I-87/99, op. cit., Para. 17 of the reasoning.

[75] Ibid., Paras. 5 and 6 of the reasoning.

following precisely determined directions, at a height of between 6,000 and 14,000 meters, and always at subsonic speed.[76]

In this case the Constitutional Court did not recognize the standing of the petitioners to file a petition for a review of the constitutionality and legality of the challenged Government order. Moreover, it reasoned that the challenged order did not directly interfere with the rights, legal interest or legal position of petitioner Ervin Dokič as regards his constitutional right to a healthy living environment as enshrined in Article 72 of the Constitution. The Constitutional Court reasoned that:

"This right is guaranteed by law. In the Environmental Protection Act, people's health, their general feeling and the quality of their lives, as well as the survival, health and conditions of living organisms (Art. 1, para. 4) are stated as the measure of all actions and regulations on environment protection. Not every modification of the environment is disallowed. It is permitted to burden the environment, if the particular modification does not exceed the prescribed standards or frameworks allowing modifications . . . the Environmental Protection Act in Article 15 introduces the principle of protecting these rights, which imposes on everyone who intends to make a modification to the environment the duty to do everything necessary to safeguard the implementation of the right of others to a healthy living environment. Moreover, this Article provides legal protection to ensure the implementation of this right. The challenged Order imposes on the competent Ministries the obligation to take any measure necessary to implement it. In adopting these measures, the Ministries are to respect the environmental protection regulations, i.e. limitation that the allowed overflights by military aircraft must not exceed the permitted burden to the environment regarding noise and other modifications."

In examining the procedural requirements, the Constitutional Court reviewed the challenged Order. It carefully examined the internal legal regulations on the overflights of foreign military aircraft over the Slovenian airspace, including the relevant provisions of the Chicago Convention of 1944 on International Civil Aviation, which was binding on Slovenia on the basis of the State succession. The Constitutional Court established that allowing overflight of foreign military aircraft on a massive scale, as was in the case with the NATO operations was not regulated in the domestic legal order of Slovenia. The Constitutional Court assessed that:

"The challenged Order results from a political decision by the Government as the competent State body for carrying out the foreign defense policy of the State. Such a decision in itself cannot be the subject of review before the Constitutional Court. However this decision, besides just being a response to NATO, would require suitable legislation. On the basis of the effective legislation, it is possible to grant a permit to flying over the State territory to foreign aircraft as well. But the legislation as a rule regulates the issuing of permits for individual overflights, prohibiting in particular overflights by armed aircraft. In the case of the NATO aircraft overflights, the issue concerned precisely the mentioned type of overflight. Such cases are not regulated by the effective legislation. Therefore, the Government should have suggested a suitable amendment to the effective legislation, or

[76] Ibid., Para. 7 of the reasoning.

the adoption of a special law, or entered into a treaty subsequently ratified by the National Assembly . . . The action by the Government, which only notified the National Assembly of its decision, and the action of the National Assembly, which only accepted this notification, although it was related to a decision the National Assembly is competent to make, do not change this state of affairs. Furthermore, the National Assembly has not only the right but also the duty to decide on matters which fall under its competence (para. 28 of the reasoning)."[77]

The Constitutional Court opined that the challenged Order, which was applied and had actual effects, should have been adopted in the form of a law by the National Assembly. However it did not grant the petitioners the necessary standing to file a petition and rejected it for this reason.[78]

It must be noted that the Slovenian Court does not resort to "the political question doctrine". However, in this case the Constitutional Court issued the so-called substantive order by which it formally rejected the petition. However, in the reasoning and without entering into the merits of the case, it assessed the issue and criticized the Government and the National Assembly for not regulating the NATO overflights in a constitutionally sound manner, (i.e. in the form of a law passed by the National Assembly). In its case law, the Constitutional Court has done this before when sensitive political questions regarding foreign affairs of the State were at stake.[79]

IV. Conclusion

The Slovenian Constitution serves as a good example of a modern Constitution which provides provisions on a healthy living environment in Article 72. It has been inserted as a human right in chapter III., and enjoys the same character as the right to the security of employment (Article 66), participation in management (Article 75), right to strike (Article 77) and right to proper housing (Article 78). As such it cannot be directly enforceable before the court and does not possess the same character as fundamental rights and freedoms. Therefore, the right to a healthy living environment cannot serve as the legal basis for lodging a constitutional complaint.

But this right has often been used as the measure of adjudication before the Constitutional Court in reviewing laws and other regulations, including the regulations of local communities. Namely, the Constitutional Court has developed its well-established case law regarding the protection of environment, especially regarding the respect for the proceedings that are prescribed for the adoption of regulations and acts, whether legislative or local, which have or may have impact on human environment. The Constitutional Court

[77] According to Article 124 of the Constitution (*National Defense*), the State Assembly is competent to adopt laws on national defence by a two-thirds majority vote of deputies present.

[78] Order No. U-I-87/99, op. cit., operative part and Para. 32 of the reasoning.

[79] Order No. U-I-128/98 of September 23, 1998 (review of the 'Israeli Agreement'), OdlUS VII, 173 and Order No. U-I-265/98 of March 8, 2001(review of the 'Macedonian Agreement'), OdlUS, X/1, 41. For details, see Škrk (2010).

has also set up some basic criteria as a threshold to determine to what extent interferences with the environment must be tolerated and the individuals must suffer them.
As a juridical body, the Constitutional Court cannot decide on issues of concrete evaluations and scientific results but it may only assess environmental standards from the point of view of constitutionality and legality. However, as we have seen in one case, the Constitutional Court has explicitly taken into account concrete data and scientific research results, namely with regard to the harmful effects of smoking when it was reviewing the amendments to the anti-smoking Act banning smoking in public places. In reviewing before ratification the Treaty on the Krško Nuclear Power Plant between Slovenia and Croatia, it made it clear that the strictest standards of safety are required with regard to the nuclear facilities, in order to respect the principle of a prohibition against the excessive burdening of future generations.
The case law of the Constitutional Court proves that it has taken into account international environmental substantive and procedural standards prescribed in relevant treaties binding on Slovenia.

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